Banks on Sentence

Sentencing Alert No 155

26 April 2017

Assisting offenders

Murder case

R v Sula 2017 EWCA Crim 206 D pleaded guilty to assisting an offender. There was a fight in Hull between two groups of men. B, D's then 17-year-old brother, stabbed someone several times with a knife. D was involved in the altercation at some stage. B told D what he had done. They left the scene together and B threw away the knife. The two went to B's hostel and changed their clothes to avoid being identified on the CCTV. They stayed at a friend's house in Hull for a day or so and then went to Birmingham, where they were arrested. D made no comment in interview. Two days later, the two went to court in the back of a police van and D was heard advising B to say that the knife was one used by the opposing group, rather than one B had brought to the scene. D and B were tried for murder. B was convicted and the jury could not agree for D. The prosecution later offered no evidence against D. D was from Albania and had no convictions of relevance. He had only had modest employment here and in Albania. The defence said D was only trying to help his immature brother and D had very limited abilities. Held. D gave B immediate and persistent assistance to the main offender. It was not trivial assistance. **4 years** after full plea credit was a severe sentence but not manifestly excessive.

Burglary

Minimum sentences How to determine

R v McLean 2017 EWCA Crim 170 D pleaded to burglary and was given a minimum sentence. The defence appealed, saying it was unjust. A member of the prosecution appeals unit noticed that the first burglary conviction was committed before the Act came into force so didn't count. Held. We must reduce the sentence. We also take into account that his last conviction was treated as a third strike burglary when it wasn't, so we further reduce the sentence to 12 months.

Murder

Relationship killings

R v Palmer 2017 EWCA Crim 376 D pleaded to murder on the day set for his trial. For two years, D had been in an on-off relationship with V, aged 48. D moved in with her and was described as very controlling. V invested considerable money in business they ran. V discovered D was having an affair and 'threw him out'. A week later she let him back in. Three or four months later, she discovered he was having another affair and she decided to end the relationship. D was told to leave and she changed the house locks. D then became mentally distressed and he drank. He was seen sobbing uncontrollably. D repeatedly called and texted V and declared his love for her. D then became aggressive and accused V of seeing someone else. V was at home on the phone and she heard a loud knock. D broke in and stabbed her with a kitchen knife, then or sometime later.

There were 31 stab and slash wounds. 19 were to her face. Some were defensive wounds indicating she had tried to protect herself. Some were caused by severe force. One was 8 cm deep. The next day D texted a friend saying, "I've killed her mate." On the same day, her mother broke in to the house and found V. The cause of death was thought to be two stab wounds to the neck. D was now aged 51 with a conviction for harassment in 2008. The judge said the attack was of unbelievable savagery. She started at 15 years. She took into account the savagery of the attack, an intent to kill and the pain she would have felt. The Judge also considered his desire to be with V was partly motivated by his financial situation. She considered the motive for the murder was anger and frustration. The Judge moved the sentence to 24 years, and with the late plea made the sentence 22 years. Held. It was a savage and brutal attack. The knife, although not brought to the scene, justified an increase in sentence. V was caused some pain. We start at 21 years, so with plea **19 years**.

Sex Offences: Images

Defendant aged just under 18 (at the time of the offending)

R v Rochford 2017 EWCA Crim 116 D pleaded to making indecent images. Just before his 17th birthday, D started downloading images. He was being groomed and encouraged by an older man. He was sentenced for 172 Category A, 252 Category B and 826 Category C images. They included a baby aged under 1 year and the anal penetration of a six-year-old. D was now aged 20. A psychiatrist said D was a gauche teenager, socially handicapped by ADHD, who had retreated from his difficulties into the online world. He had fallen prey to those exploiting him. D presents a low risk of harm to children. The Judge made the case Category 1A. Held. The aggravating factors were the ages of the children, the significant number of images, the image of the six-year-old and that the offending lasted two years. The powerful mitigation included D's immediate co-operation, his good character, his youth, the fact D was being groomed and encouraged by an older man and there were no moving images. The number of images was not large by some standards. The Judge should have given more weight to mitigation, in particular, D's youth, his psychiatric problems and vulnerabilities, his immaturity, his susceptibilities and that he was being groomed. We start at 9 months, so with plea, **6 months** not 12. The factors listed are good grounds to **suspend** the YOI.

Theft

High-value shop theft Persistent offenders

R v Chamberlain 2017 EWCA Crim 39 D pleaded to attempted theft. In a shop, D took some clothes worth £78 into a changing room. She covered the price tags with foil and hid the clothes in her bag. D was stopped by staff. She was aged 44 and had about 100 previous convictions. About 80 were thefts. She had received all sorts of community disposals as well as short prison sentences. Her recent ones included: in January 2015, shoplifting (fine); in April 2015, shoplifting on bail with breach of a community order (community order); in June 2015, shoplifting (12 weeks); in April 2016, shoplifting and going equipped (8 weeks with breach of suspended sentence concurrent); and in July 2016, possession of cannabis and failure to attend drug assessment (fine). A week after this offence, D received 4 months for theft from a person. Held. This offence was committed on bail. There was scant mitigation in that it was an attempt because that was because of diligent staff. For persistent offenders each custodial sentence must not inevitably be longer than the previous one. The sentence length must be proportionate to the offence. With the top of the range being 12 weeks, a 3-year starting point was too long. We start at 12 months so with plea, 9 months, not 2 years.

Variation of sentence

Crown Court Extent of the power

R v Warren 2017 EWCA Crim 226 After the Judge had passed his sentence, the prosecution told the Judge he had misstated the facts for D. The Judge said he would not increase the sentence.

Later the Judge learnt the prosecution were preparing to appeal the sentence. The Judge then listed the case and increased the sentence from 6 years 8 months to 8½ years. Held. The current state of the law is as follows.

1) Where an error occurs in the factual basis of sentence it should be pointed out to the court as soon as possible and consideration should be given to correcting it at the earliest opportunity, preferably by revisiting [the] sentence on the same day rather than a subsequent day.

2) A judge should not use the slip rule simply because there is a change of mind about the nature or length of the sentence but the slip rule is available where the judge is persuaded that he had made a material error in the sentencing process whether of fact or law. It is relevant in considering whether he had made a material error that that error might be corrected by the Court of Appeal on the Attorney General's application.

3) The sooner the slip rule is invoked in such a case, the better. The passage of time from the first decision to its revision is a material consideration as to how the power should be exercised, but there is a 56-day cut off in any event.

4) A judge should not be unduly influenced by the prospect of a reference being made to change the sentence that he thought was right at the time by the mere threat of a review by the Attorney General. If the judge concludes that the sentence was not wrong in principle and was not unduly lenient, he should not change his mind simply because there is the possibility of a reference. The judge can then use the opportunity at the further sentencing hearing to give any further explanations for the original decision for the sentence.

5) [See below]

6) Although *R v Nodjoumi* 1985 7 Cr App (S) 183 no longer identifies the basic rule in such cases, the appearance of justice and the impact of the change on a defendant where an error has not been induced by anything that he has said or done is a relevant consideration and in appropriate cases it can be reflected in a modest discount to the proposed revised sentence to reflect this fact. This [was] done in this case. We consider that modest discount was appropriate and sufficient.

Attendance of the defendant

R v Warren 2017 EWCA Crim 226 The defendant, D, was not brought to court because of an 'administrative slip'. The Judge increased D's sentence, saying his advocate was well able to make submissions. Held. Sentencing and re-sentencing should take place in the presence of the [defendant] and administrative convenience should not be allowed to degrade that principle. But if for one reason or another the defendant cannot be brought to court in the 56 days, there is a discretion to proceed in his absence so long as there is an advocate who is properly instructed and is able to make pertinent submissions, [which D's] advocate was. Relisting the case was the preferable course. However, the Judge could hear the application in the absence of D.

Note: Many would consider the defendant should have been able to hear why he will serve a longer term and the case should have been adjourned. A slip-up is the lamest of excuses for denying D his important right. If D is not there, justice is seriously eroded. Rule 28.4(4)(b) makes the rest of the rule worthless. Interestingly, the Judges' decision is contrary to the principle they stated. Ed.

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